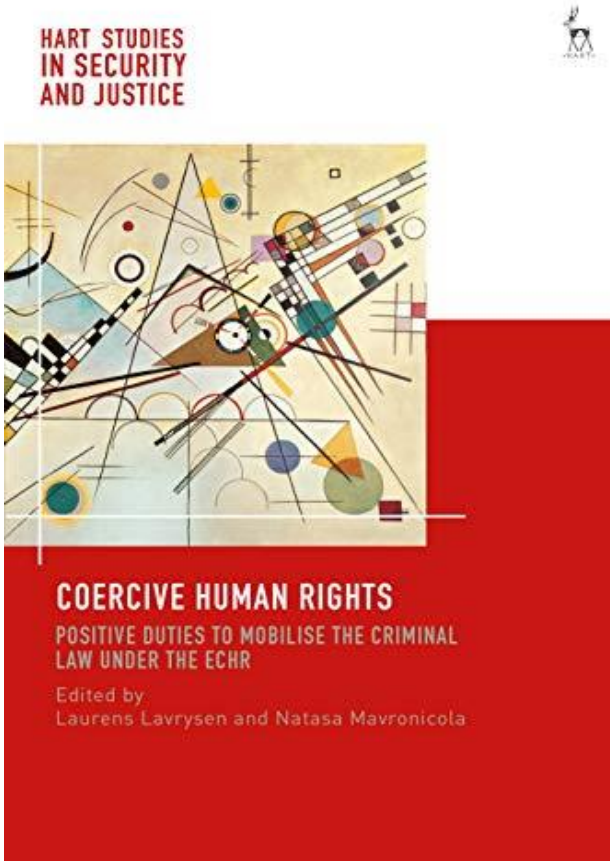
Coercive Human Rights – Positive Duties to Mobilise the Criminal Law under the European Convention of Human Rights, Laurens Lavrysen, Natasa Mavronicola (eds), Hart Publishing, 2020, 328 p., ISBN: 978-1-5099-2787-5



That the judgments of the ECtHR have had a significant impact in the field of criminal law is beyond any doubt. They have contributed to the abolition of the death penalty, the safeguarding of prisoners' rights, the prohibition of whole life imprisonment without any prospect of release, the decriminalization of homosexuality and the protection of freedom of expression. The Court has made it abundantly clear that the Convention sets limits to the power of the states to design their penal policy, not least in respect of criminalization and punishment. However, the relationship between penal policy and human rights still gives rise to complex questions and the volume reviewed here explores the questions arising in respect of one key dimension of this relationship, the European Court of Human Rights' 'coercive human rights doctrine', in a truly remarkable way.

The two editors, L. Lavrysen and N. Mavronicola, have involved an impressive number of authors specialized in human rights and criminal law, with the aim of providing the reader and the academic community with "the basis for a meaningful re-assessment of the doctrine of coercive human rights and critical discourses surrounding it". (16) The discussion, structured around 13 chapters, starts by reviewing the impact of the ECHR in the area of criminal and penal law. The contributing authors examine, through a thorough presentation of the case law of the ECtHR, how the coercive duties developed by the ECtHR serve to make the Convention rights and freedoms practical and effective, instead of theoretical and illusory. While the Court does not require states to prevent every risk of ill-treatment from materializing or to criminalize every human rights violation, it recognizes a series of diverse positive obligations under the Convention, ranging from the obligation to criminalize certain acts to the obligation to provide

redress for human rights violations and the obligation to protect individuals from harm under certain circumstances.

These 'coercive duties' raise "a whole range of challenges that go to the heart of the purpose and function of human rights law". One of the themes of the book is, therefore, the possible tension between the human rights of the (potential) victims and those of suspects and defendants; the question of the balance between the protection of individuals against arbitrary interference by public authorities and the margin of appreciation that the domestic authorities enjoy in designing their penal policy; the question of the limitation of criminal law from the perspective of the victims' human rights; and the risks of mobilizing the criminal law through the coercive human rights doctrine.

Another important question examined in the book is that of the extensive coercive reach of the ECtHR and especially the risk of 'coercive overreach'. Indeed, the ECtHR has often been criticized for not setting proper limits to the duty to prosecute and punish and for becoming a machine that encourages criminal inflation. This phenomenon, that no one can deny, is associated to the will of national authorities to "instrumentalize" the Court's case law so as to serve national political agendas based on security. On this topic, the book provides the reader with a most enlightening analysis.

The volume is divided in four parts preceded by an introduction by the two editors **(Chapter 1)** that analyses key concepts that are necessary for the understanding and further analysis of the evolution of the ECtHR's coercive human rights doctrine. The four parts of the volume explore the following issues: the contours of the Court's reasoning **(Part I)**; the interests and needs of (potential) victims of human rights violations **(Part II)**; the most pressing challenges raised by, and for, the ECtHR's coercive duties doctrine **(Part III)**; and under-explored aspects of the doctrine and the doctrine's implications **(Part IV)**.

Part I, entitled *Key Threads in ECtHR Doctrine*, analyses the development of States' obligations under the European Convention and the ECtHR's tendency to develop its case law in the field of criminal law incrementally. In Chapter 2, Laurens Lavrysen examines the development of the positive obligation doctrine in the field of criminal law and concludes that "there is no-clear cut distinction between substance and procedure in the Court's positive obligations case law". (31) For the author, "the obligation to criminalize and the obligation to punish thus interrelate in the same way that the overarching categories of substantive and procedural positive obligations, in which they are embedded, do". (32) In Chapter 3, Paul Lemmens and Marie Courtoy analyse how "prevention may be achieved through the deterrent effect of criminal law". (66) They argue that States should provide a law-enforcement machinery that can ensure that the substantive criminal-law rules produce practical effects. (57)

Part II, entitled *Perspective on Victims' Protection and Redress*, focuses on the particular needs and vulnerabilities of (potential) victims of human rights violations. In Chapter 4, Alina Balta analyses the substantive and procedural obligations of states

under the ECtHR case law, scrutinizing their implications for victims especially in the field of reparations. The author argues that the retributive responses of the victim are seen as a precondition for "the restoration of social standing and worth of victims, and the restoration of shared values". (87) Not dissimilarly, Corina Heri considers in Chapter 5 the vulnerability of the victims as another key element that should be taken into consideration by the Court in its judgments. In Chapter 6, Stephanos Stavros analyses one of the most burning contemporary issues affecting the very existence of our 'democratic societies', that of the spread of hate speech. In his opinion, the ECtHR has adopted a balanced approach to cases concerning the criminal mobilization against hate speech and concludes that the ECtHR "has resisted (till now) the temptation of applying Article 17 too widely, has preferred internal to external sources when looking for support for its interpretational choices and has even called, in obiter, for restraint in the use of criminal law". (123)

Part III, entitled *Critical Reflections: Theory, Impact, Limitations*, considers the challenges for the coercive human rights doctrine and provides a well-grounded analysis of its effects on theory, that of both human rights and that of criminal law. In Chapter 7, Nina Peršak argues that the ECtHR tries to provoke an 'effective deterrence' effect. In her opinion, "the Court applies and stretches positive obligations of the state to include the criminalization of certain conduct". (150) This entails in some cases the potentially undue expansion of criminal law. In this connection, Mattia Pinto analyses in Chapter 8 the effect of the ECtHR case law on domestic law and develops the idea that the Court's case law has fostered a 'culture of conviction' at the domestic level. (162) Using the Modern Slavery Act (MSA), adopted in England and Wales in 2015, as a case study, the author illustrates how domestic authorities may appropriate the language of coercive human rights to foster and legitimize penal expansion. In Chapter 9, Natasa Mavronicola unpacks three key dangers that the ECtHR's coercive human rights doctrine gives rise to: coercive overreach, dilution, and diversion. In the author's opinion, the danger of coercive overreach relates to the potentially excessive reach of the Court's demands of criminalization and punishment. (184) The danger of dilution is associated to the narrowing of human rights protections when refracted through a criminal lens (192) and the danger of diversion to the way in which the Court diagnoses and seeks to cure, and prospectively to curb, violations of fundamental human rights and their causes. (198) Finally, Chapters 10 and 11, by Vladislava Stoyanova and Brice Dickson, offer a more concrete illustration on how the coercive human rights doctrine can create complex challenges in the context of immigration and transitional justice respectively.

Part IV of this volume, entitled *Uncharted Waters for the ECtHR's Coercive Duties Doctrine*, focuses on the risk of an 'coercive overreach' that can potentially threaten the space of individual freedoms. In order to illustrate this idea, Liora Lazarus analyses the context that contributed to the adoption of the UK Modern Slavery Act (Chapter 12) and Kelly M. Pitcher discusses Dutch law and practice regarding unlawfully obtained evidence in the pre-trial phase of criminal proceedings (Chapter 13).

Overall, this volume demonstrates, in a holistic way, how coercive human rights duties have inevitably generated tensions with some of the more 'orthodox' concerns of human

rights law, which has so far mostly focused on protecting of defendants against abuses in the criminal justice system. It also offers a solid basis from which to reappraise concrete developments related to the criminal law (enforcement) tools that are capable of affording effective redress for human rights violations and determine individual criminal liability.